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Supreme Court, U.S.
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No. 02-959

IN THE

Supreme Court of the United States

TAMARA WATSON,

Petitioner,

v.

LITHONIA LIGHTING, D/B/A HI-TEK GROUP, A WHOLLY OWNED SUBSIDIARY OF NATIONAL SERVICE INDUSTRIES, INC., AND NATIONAL SERVICE INDUSTRIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner Tamara Watson respectfully submits this reply in further support of her petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

ARGUMENT

The question whether an employer may insulate itself from the obligations of the Americans with Disabilities Act of 1990 (the "ADA"), 42 U.S.C. § 12101 *et seq.*, by asserting that it requires all employees to be capable of "rotating" through all positions within a facility is starkly presented in this case. Plaintiff presented evidence that, despite her disability, she was capable of working on certain of the assembly lines within defendant's facility. *See* Pet. App. 15a; *id.* at 23a. The record contained no evidence to the contrary. Defendant instead relied upon an affidavit from its own human resources manager asserting that employees in the position held by plaintiff, a Manufacturing Operator ("MO"), could be moved from line to line, *id.* at 27a, and upon a "job description" – created subsequent to plaintiff's initial injury – stating that "employees may be switched at any given time from line to line" and "must be able to perform the maximum requirements of each particular line," *id.* at 30a. Despite deposition testimony and an affidavit from plaintiff indicating that this type of "line-to-line" rotation actually was a sporadic and *ad hoc* occurrence at the facility, the court below concluded "as a matter of law" that such rotation was an "essential function" of the MO position. On that basis alone, the court affirmed summary judgment. Accordingly, this case presents a simple and straightforward set of facts upon which this Court can consider the appropriate standard for determining what functions of a position are "essential," and how that issue is to be addressed in the context of a summary judgment motion.

Defendant, in opposition to the petition, asserts that plaintiff "admitted" that she could not perform the "essential functions" of the MO position, and thus that the decision of the court of appeals was nothing more than an uncontroversial application of summary judgment standards. Opp. at 1-3. And defendant argues that the decision below does not conflict with decisions of other courts because those other courts were not faced with similar "admissions" of the plaintiff's inability to perform "essential functions." Opp. at 5-7. Thus, in essence, defendant argues that because of this supposed "admission" by plaintiff, this case does not squarely present any legal issues because plaintiff necessarily would lose no matter what legal standard was applied.

The assertion that plaintiff "admitted" that she could not perform the "essential functions" of the MO position, however, is a mischaracterization of the factual record that was before the court below. By relying almost exclusively upon this easily-rebutted assertion, defendant further demonstrates precisely why the decision of the court below was incorrect and why that decision conflicts with decisions of other courts and the applicable regulations of the Equal Employment Opportunity Commission ("EEOC"), 29 C.F.R. § 1630.2(n).

Defendant argues that plaintiff made her supposedly fatal "admission" in her deposition testimony. Opp. at 1-3. But that testimony contains no such admission. In her testimony, plaintiff did admit that, within a particular assembly line, she would rotate from station to station "three to four times a day." Opp. at 2 (quoting Pet. App. 15a). But that type of station-to-station rotation was *not* the type of "rotation" that was at issue, because the record contained clear evidence that, *even with such station-to-station rotation*, there were certain assembly lines on which plaintiff

could work even with her disability. Pet. App. 15a; *see also id.* at 23a.

The "rotation" at issue in the decision below was not station-to-station rotation, but rather was line-to-line rotation. And plaintiff clearly did *not* "admit" that line-to-line rotation was a "norm" at the facility, let alone that such line-to-line rotation was an "essential function" of the MO position. When asked at her deposition about her experience with line-to-line rotation, plaintiff testified: "[y]ou might be moved [from line to line] a couple time a week. Sometimes you might not be moved at all." Opp. at 3 (quoting Pet. App. 16a). And in an affidavit submitted in opposition to the summary judgment motion, she stated that, upon being hired, she had been "permanently assigned" to a single line, with only "occasional" transfers to other lines to meet "production needs."[1] Pet. App. 22a. In sum, her deposition testimony and affidavit constituted evidence that line-to-line rotation

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[1] Defendant argues that "the affidavit was defective in that Watson did not affirmatively show that she is competent to testify to the matters stated therein, as astutely noted by the court of appeals." Opp. at 3. But the court of appeals "noted" no such thing. Rather, the court of appeals – like defendant in its Opposition – manufactured an "admission" by plaintiff that "rotation is Lithonia's norm and serves a business purpose." Pet. App. 3a. Because of that supposed "admission," the court of appeals simply ignored the portion of plaintiff's affidavit in which she *disputed* that "rotation" was a "norm." The court of appeals, however, did address a different portion of the affidavit, in which plaintiff stated that two other employees were "on non-repetitive motion restrictions similar to [her] own." Pet. App. 23a. With respect to that part of the affidavit, the court of appeals did *not* address Petitioner's "competence," but rather held (incorrectly) that it was not based upon "personal knowledge," *id.* at 3a, even though plaintiff had personally worked at the facility for almost two years, and thus had an obvious basis for personal knowledge concerning work assignments of other employees.

was neither the "norm" nor a regular occurrence at the facility, but rather was at most sporadic and *ad hoc*.[2]

Under the EEOC regulations, and decisions of courts that have applied a multi-factor analysis similar to those regulations, plaintiff's deposition testimony and affidavit would have been more than sufficient to demonstrate a "genuine issue" of "material fact" within the meaning of Fed. R. Civ. P. 56(c). This evidence would have been relevant to a number of the factors listed in 29 C.F.R. § 1630.2(n), including the "amount of time spent on the job performing the function," the "consequences of not requiring the incumbent to perform the function," and the "work experience" of "past" and "current" incumbents in the position. In short, plaintiff's own experience in the position – that she was permanently assigned to a single line, and that she was asked to work on other lines only sporadically – was evidence that line-to-line rotation was not "essential" to the MO position, but rather was at most only a "marginal" aspect of that position. *See* 29 C.F.R. § 1630.2(n)(1) (distinguishing between "essential" and "marginal" functions); *see also Skerski v. Time Warner Cable Co.*, 257 F.3d 273, 283 (3d Cir. 2001) ("Skerski's ability to perform as an installer technician for more than three years without climbing might lead a reasonable juror to infer that Skerski's inability to climb had no adverse consequences for his employer, a factor that is relevant to determining what is an essential function."); *Kiphart v. Saturn Corp.*, 251 F.3d 573, 585 (6th Cir. 2001) (despite evidence that the "job rotation concept" played an "essential role" in Saturn's "operational

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[2] Defendant contends that plaintiff's affidavit "contradicted" her deposition testimony, and should be ignored for that reason. Opp. at 3. But neither the district court nor the court of appeals relied upon any such "contradiction." And, in fact, on the issue of line-to-line rotation, her deposition testimony and affidavit were entirely consistent with each other.

vision," reversing judgment as a matter of law where "the actual consequences of not requiring employees to rotate fully appear far less severe than Saturn suggests").

Thus, the claim that the decision below does not conflict with decisions of other courts or with the EEOC regulations hinges upon a mischaracterization of the factual record in this case. Because plaintiff *did* present evidence that line-to-line rotation was *not* an essential function of the MO position, the decision below quite clearly does conflict with decisions of other circuit courts, *see* Pet. at 15-23, and with 29 C.F.R. § 1630.2(n), *id.* at 23-25.

Finally, defendant contends that plaintiff has "overstate[d]" or "exaggerate[d]" the implications of the decision below. Opp. at 8. But, again, that contention is based upon an asserted "concession" by plaintiff of "her inability to show herself qualified[.]" *Id.* As demonstrated above, plaintiff never made any such concession. When that mischaracterization of the record is put to one side, then the implications of the decision below are indeed startling. The employer in this case prevailed "as a matter of law" on the issue of "essential functions" even though the employer's only evidence consisted of after-the-fact assertions, and even though those assertions were directly disputed by plaintiff's deposition testimony and affidavit. The court of appeals upheld summary judgment by blindly accepting the employer's own self-serving assertions, ignoring plaintiff's contrary evidence, and speculating on the theoretical (but factually unsupported) "benefits" of a rotation system that had not been proven to exist (let alone proven to exist "as a matter of law").

Under the decision of the court of appeals, an employer need only *claim* that it has a "rotation" system that requires all employees to be able to perform all tasks of all jobs within a facility, and that employer is insulated from ADA

liability. It is neither exaggeration nor overstatement to say that this decision, if allowed to stand, will vitiate the protections of the ADA within any large-scale manufacturing facility, at least within the Seventh Circuit and other jurisdictions that follow the decision below. In those parts of the country, "rotation" will become synonymous with "disability free." This Court should grant the petition to consider this important issue, and to resolve the existing confusion surrounding the appropriate standards for determination of a position's "essential functions."

CONCLUSION

For the reasons stated herein, and in the petition for a writ of certiorari itself, the petition should be granted.

Respectfully submitted.

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